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11 ELENA MORENO

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN JOSE DIVISION

15 UNITED STATES OF AMERICA,
16 Plaintiff,
17 v.
18 ELENA MORENO, et al.,
19 Defendants.

CASE NO. CR-12-00750-03-LHK

**DEFENDANT ELENA MORENO'S
RESPONSE TO THE GOVERNMENT'S
SENTENCING MEMORANDUM**

Sentencing Date: January 21, 2015
Time: 9:30 a.m.
Judge: The Honorable Lucy Koh

I. INTRODUCTION

Defendant Elena Moreno submits this hastily-drafted response to the government's late-filed sentencing memorandum¹ in order to correct a number of incorrect and unsupported statements in the government's filing and to request that the portions of the government's sentencing memorandum that violate its plea agreement with Ms. Moreno be stricken from the record and not considered by the Court.

II. ARGUMENT

A. Portions of the Government's Sentencing Memorandum that are in Breach of its Plea Agreement with Ms. Moreno Should Be Stricken.

After an extremely hard-fought negotiation with the government, the parties agreed that the combined offense level applicable to Ms. Moreno under the Guidelines was 20 or 21 (33-41 months or 37-46 months) but that Ms. Moreno would be permitted to seek a downward variance under 18 U.S.C. § 3553(a). Dkt. No. 101 at 8, 10. Despite this agreement, the government has now submitted a sentencing memorandum that asserts that the correct Guidelines level is 24 (51-63 months) and that asserts the government could have sought an even higher Guidelines sentence.² Feigning generosity of spirit, the government seeks to impress the Court that its recommendation of 33-37 months represents a generous downward variance from the applicable Guidelines range of 51-63 months. But this is not what the parties agreed. The government cannot now strip Ms. Moreno's plea agreement of any meaning at the eleventh hour by ratcheting up its assertion of what Guidelines range applies and by implying that the government could have somehow obtained an even higher Guidelines range.

¹ Responses to sentencing memoranda are due today. Because of the government's late filing of its sentencing memorandum, Ms. Moreno's counsel has had only one day to prepare a response.

² Counsel for Ms. Moreno notified the government that it was in breach of the plea agreement at approximately 1:13 p.m. today and requested that the government voluntarily withdraw its sentencing memorandum immediately. As of the time of this filing, counsel for Ms. Moreno has not received a response from the government.

1 The fact that the government ultimately recommends a sentence that falls within the
 2 Guidelines range that the parties agreed was applicable is of no import. As our court of appeals
 3 has articulated, the government breaches a plea agreement when “it purports to make the promised
 4 recommendation while winking at the district court to impliedly request a different outcome.”
 5 *See, e.g., United States v. Heredia*, 768 F.3d 1220, 1231 (9th Cir. 2014) (internal quotation marks
 6 omitted). Moreover, the government’s exhortations that its recommended sentence (which falls
 7 within what the parties agreed is the correct Guidelines range *before* any § 3553(a) variances)
 8 represents a meaningful downward variance to take into account § 3553(a) factors has
 9 affirmatively harmed Ms. Moreno and stripped her of the benefit of the plea agreement.

10 In light of the government’s breach, Ms. Moreno makes the modest request that the Court
 11 strike from the record, and from its consideration: (1) all assertions by the government that the
 12 appropriate combined offense level for Ms. Moreno under the Guidelines is 24 (and all other
 13 calculations inconsistent with the plea agreement) (Dkt. No. 113 at 2:2-4; 12:25-13:2; 13, n.3;
 14 18:1-3); (2) the government’s claims that its recommendation of 33 to 37 months represents a
 15 downward variance from the Guidelines (*Id.* at 22:9-14; 23:23-24); and (3) the government’s
 16 nebulous claims that it could have argued for higher loss amounts which would have increased
 17 Ms. Moreno’s Guidelines range (*Id.* at 25:24-24:3). Ms. Moreno also requests that the Court make
 18 a finding that the parties have agreed that the applicable combined offense level under the
 19 Guidelines (from which any variance would be taken) is 20 or 21.

20 **B. The Government Mischaracterizes the Evidence Regarding the Morenos’ Reliance on**
 21 **MJ Consulting.**

22 The government makes much of the Morenos’ attempts to modify their home loans after
 23 they went underwater on their mortgages. However, the Morenos’ efforts at loan modification are
 24 unspectacular when viewed in light of their proper context: a family drowning in consumer debt
 25 after one of the largest housing crashes in our country’s history. When the Morenos experienced
 26 additional financial hemorrhaging after their business was raided, they were criminally prosecuted,
 27 and their competitors sent out press releases regarding their criminal prosecution, they became
 28 increasingly desperate. Recognizing the mortgage loans that their family had taken on were

1 unsustainable, the Morenos sought the advice and counsel of Yesk Law Group/MJ Consulting,
2 Inc. (“MJ Consulting”) and ultimately allowed inaccurate loan modification applications to be
3 submitted on their behalf.

4 Despite Ms. Moreno’s inexcusable culpability, to say that she was the manager/supervisor
5 of the loan modification industry professionals at MJ Consulting goes too far. As articulated in
6 Ms. Moreno’s sentencing memorandum, the government’s assertion that Ms. Moreno could
7 somehow be a manager/supervisor of the MJ Consulting employees is nothing short of fantastical,
8 especially in light of the fact that the employees were overseen by attorney Michael Yesk. *See,*
9 *e.g.,* Exhibit A; Dkt. No. 113-2 at 15, 33.

10 In support of its assertion that a leadership enhancement must be applied to Ms. Moreno,
11 the government relies solely upon unreliable, and at times unintelligible, translated notes from an
12 unidentified employee at MJ Consulting. A careful examination of these notes does not support
13 the government’s cavalier assertion that Ms. Moreno was the architect and driving force behind
14 the inaccurate loan modification applications generated by MJ Consulting. Instead, the vast
15 majority of the government’s citations are only to notes of conversations between MJ Consulting
16 *and the underwriters*, not MJ Consulting and Ms. Moreno. Further, there is no indication that MJ
17 Consulting passed along the content of its critical communications with the underwriters to Ms.
18 Moreno or any of the Morenos. Indeed, even the government’s own description of the records (as
19 opposed to its conjecture of what the records might suggest could have happened) clearly describe
20 a classic client-consultant relationship in which MJ Consulting dictated what materials would need
21 to be submitted and Ms. Moreno simply complied with the discrete, secretarial tasks asked of her.
22 There is no support for the government’s bare assertion that Ms. Moreno had “authority to decide
23 what documents would be provided to MJ Consulting, and perhaps more tellingly, what
24 documents *would not* be passed along to the underwriters.”

25 Although Ms. Moreno’s ratification of false statements on her loan modification
26 applications was dishonest and wrong, Ms. Moreno’s only intention was to stay afloat and keep
27 her homes from being foreclosed upon. The ironic reality is that the loan modifications for
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Hillview (Ms. Moreno's home) and Cadiz (her brother-in-law's home), *avoided* significant losses to the banks. Had the Morenos allowed the homes to be foreclosed upon back in 2011, the homes would assuredly been sold at auction a substantial loss, as the real estate prices were at an all-time low.³ The current value of the homes today, after significant market recovery, would very likely exceed their 2011 prices significantly.

C. The Government Has Failed to Provide Sufficient Evidence for this Court to Cast Aside the Probation Office's Recommendations Regarding Restitution and Loss.

1. Restitution.

The Probation Office determined that the appropriate restitution amount for Count Thirteen is \$219,000. PSR ¶ 94. The government, however, asks this Court to increase significantly the Probation Office's recommendation by \$220,735.22 (to a total of \$439,735.22). Dkt. No. 113 at 10. Ms. Moreno contends that the government has not met its burden for such an increase.

Although Ms. Moreno does not contest that certain costs claimed by Wells Fargo and Nationstar Mortgage that cannot be used for calculating loss under the Guidelines may be nonetheless awarded as restitution, Ms. Moreno notes that the government seeks to double Ms. Moreno's restitution liability based solely on a vague, two-page "summary" document from Wells Fargo (Exhibit 6 to Government's Sentencing Memorandum, Dkt. No. 113-6) and a similarly vague "summary" document from Nationstar Mortgage (Exhibit 9 to Government's Sentencing Memorandum, Dkt. No. 113-9).⁴ These documents are woefully inadequate to supporting the requested restitution award.

³ The government's agreement with Ms. Moreno precludes it from arguing that Ms. Moreno should pay restitution associated with Hillview or Cadiz. To Ms. Moreno's surprise, however, the government has asserted that Wells Fargo has lost \$53,576.08 and Bank of America has lost \$39,627.60 as a result of approving loan modifications for Hillview and Cadiz, respectively. Dkt. No. 113 at 28.

⁴ The government's request for increased restitution includes \$33,578.35 to account for a debt cancellation by Wells Fargo, which the government asserts was in relation to the Chesbro property. Dkt. No. 113 at 9. There was no line of credit from Wells Fargo, however, taken out with respect to the Chesbro property.

1 Dated: January 16, 2015.

Respectfully submitted,

2 CLARENCE DYER & COHEN LLP

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4 By: /s/ Nanci L. Clarence

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5 Gina Moon

6 Attorneys for Defendant Elena Moreno